

Appendix 5

Institutional Controls

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A5.0 Introduction

Institutional controls are non-engineered, administratively and legally enforceable measures that limit human exposure to environmental chemicals of concern (COCs). Institutional controls can serve several purposes, including:

- Notifying current and future owners about the environmental conditions of the property
- Limiting use of the land to prevent activities that could result in unacceptable exposures to receptors

Institutional controls are used when a cleanup leaves COC concentrations that exceed residential closure levels, and exposure to the remaining contamination must be prevented. Whenever institutional controls are used, a control requirement (or environmental notice) is recorded where a reasonably diligent inquiry into a property should uncover the existence of such a notice. Examples of institutional controls are land-use restrictions, deed restrictions, deed notices, and declarations of environmental restrictions.

A common method of recording an institutional control is the deed notice, or, for Risk Integrated System of Closure (RISC) purposes, an environmental notice. Under certain circumstances, a local ordinance can substitute for an environmental notice. The primary criteria for an institutional control are that it (1) provide legal notice to current and potential future property owners of the nature and extent of the restrictions, (2) be permanent, and (3) be legally valid.

An institutional control is required for the following situations:

- A commercial or industrial land-use designation
- An activity restriction used as part of a remedy
- An engineering control used as part of a remedy

The environmental notice notifies future owners or lessees of contamination present at a site and ensures that the restrictions and controls included in the approved remedy are legally recorded. A generic environmental notice form is provided at the end of this appendix.

The Indiana Department of Environmental Management (IDEM) does not have the statutory authority to enforce an environmental notice. However, if a current or subsequent property owner subject to an environmental notice creates or exposes a pathway protected by the environmental notice, IDEM has the authority to bring an enforcement action against that owner for causing a release into the environment.

An environmental notice can also be used when contamination has migrated to an off-site property if the off-site property owner agrees to accept the restrictions incorporated in the environmental notice. The environmental notice can be recorded using the generic form at the end of this appendix or using another customized format. Use of another format is acceptable as long as the information provided meets the criteria discussed below.

A5.1 Environmental Notice Criteria

Environmental notices must meet the criteria listed below.

1. Environmental notices must be recorded on the deed of the affected property by filing the environmental notice with the county recorder in the county in which the property is located.
2. Environmental notices must run with the land, meaning that conditions still apply after property ownership has transferred.
3. Environmental notices must identify the COCs where concentrations exceed closure levels, the media affected by the COCs, and the conditions or restrictions imposed on the property.
4. Environmental notices must state that performing restricted activities could result in unsafe exposure. [Chapter 6](#) of the Technical Guide discuss closure requirements.
5. Environmental notices must be legally valid documents. They can be recorded on a form provided by IDEM or in an appropriate document drafted by the user and approved by IDEM. If the user drafts the environmental notice, it must meet the minimum requirements specified either in the rule (if one is published) or in the “Minimum Environmental Notice Requirements and Language” specified below.
6. Environmental notices must satisfy IDEM’s concerns regarding permanence, legal validity, and informed consent.

7. Environmental notices must describe terms and procedures for modifying or removing the restrictions. This must include, at a minimum, a statement that the site must be reassessed and IDEM's approval must be granted before the restriction identified in the environmental notice can be modified. Such provision for compliance shall be evidenced by providing a true copy of the recorded environmental notice to IDEM.

A5.2 Minimum Environmental Notice Requirements and Language

An environmental notice must satisfy the minimum requirements below.

1. A legal description of the real estate must be provided accompanied by scaled maps showing the following:
 - Horizontal extent of contamination exceeding applicable remediation objectives
 - Legal boundaries of all properties where contamination exceeds applicable remediation objectives and that are subject to the restrictive covenant
2. The location where the public may review the approved remedial plan must be specified.
3. The environmental notice should list COCs in the remedial plan that will be left on the property at concentrations exceeding residential closure levels and the media (surface soil, subsurface soil, or ground water) impacted by the COCs.
4. A description must be provided of any limitations on the land-use designation (for example, commercial/industrial or residential).
5. A clear description in simple terms must be provided of each activity restriction within the proximity of the contaminated portion of the property. This description must identify any limitations on activities including, but not limited to, the following:
 - Ground water usage
 - Soil exposure through gardening
 - Digging into soil

6. A description must be provided of all actions necessary to maintain any engineered control measures established under the corrective action plan that render any potential exposure pathway incomplete. The description should include a demonstration of financial assurance mechanisms (if required under Resource Conservation and Recovery Act [RCRA]) for maintenance of the selected remedy and reporting requirements.
7. The environmental notice should include a statement that the environmental notice runs with the land.
8. The environmental notice should include a statement that any amendment, modification, or termination of the restrictions can be made only with IDEM's approval.

A5.3 Environmental Notice Alternative for Ground Water Contamination

An environmental notice to prevent exposure to contaminated ground water may not be necessary if an ordinance adopted by a unit of local government effectively prohibits exposure to ground water. An example of such an ordinance would require all residents to utilize the municipal water supply and would prohibit the installation of new drinking water supply wells in the county or municipality where the contaminated area is located.

The information below is required to support a request to replace the requirement for an environmental notice for ground water contamination:

1. The request must include the name and address of the local unit of government and a copy of the most current version of the ordinance restricting ground water use. An authorized official of the local unit of government must certify that the ordinance is complete, accurate, and in effect. The ordinance must demonstrate that exposure to ground water is prohibited.
2. A scaled map should delineate the areal extent of ground water (either measured or modeled) containing contamination that exceeds applicable closure levels. Information should be provided regarding COC concentrations in ground water that exceed applicable closure levels.

3. A scaled map should delineate the boundaries of all properties where COC concentrations in ground water exceed applicable closure levels.
4. The current owners and leaseholders of each property should be identified on the map that shows the ground water contamination.

The information above should also be provided in a notification to the local unit of government with authority over the ordinance and to each property owner and leaseholder identified in the scaled map. The notification must provide the following information:

- The site name, address, and IDEM site number
- Notification that IDEM is reviewing a request to use the ordinance restricting ground water use to substitute for an environmental notice
- A statement about the nature of the release and response actions taken
- A statement about where more information can be obtained about the ordinance

Copies of the notification submitted to the local unit of government, property owners, and leaseholders must also be provided to IDEM before the ordinance can be considered a substitute for an environmental notice.

Any approval by IDEM to replace the environmental notice with an ordinance will not become effective until it is recorded in the Office of the Recorder or Registrar of Titles of the county where the site is located. The person receiving the approval must obtain and submit to IDEM information demonstrating that the replacement was recorded.

The current owner, leaseholder, or successor of a site who receives approval to use an ordinance to replace the environmental notice must conduct the following activities:

1. Monitor activities of the unit of local government related to variance requests or changes in the ordinance regulating ground water use
2. Notify IDEM of any approved variance requests for ordinance changes within 30 days after the date such action was approved

3. Establish adequate controls when any approved variance requests or ordinance changes result in the diminishment or elimination of effective prohibition of exposure to ground water previously provided by the ordinance

If any of the following should occur, closure may be voided:

1. Repeal or other modification of the ordinance by the local unit of government
2. Approval of a site-specific request, such as a variance, that allows exposure to ground water
3. Violation of the terms of a recorded institutional control

Environmental Notice Generic Form

THIS COVENANT engineered this _____ day of _____, 20____, made by [name and address of current property owners] (together with his/her/its/their successors and assigns, collectively “Owner”).

WHEREAS: _____ owns real estate in the County of _____, Indiana, which is more particularly described in the attached Exhibit “A” and made a part hereof (“real estate”);

WHEREAS: A corrective action plan was prepared and implemented in accordance with Indiana law as a result of a release of regulated or hazardous substances upon said real estate. The corrective action plan, as approved by the Indiana Department of Environmental Management (“the Department”), provides that the regulated or hazardous substances shall remain on or beneath the surface of the real estate and provides for institutional controls that shall ensure the protection of public health, safety, or welfare, and the environment. The corrective plan, a survey of the areas on said real estate affected, and a list of the chemicals of concern may be examined at the offices of the Department.

(If the restriction is placed on a third party’s property, the above paragraph should be modified to read as follows:

WHEREAS: A corrective action plan was prepared and implemented in accordance with Indiana Law as a result of a release of regulated or hazardous substances upon the property described in the corrective action plan (“property”). The corrective action plan, as approved by the Indiana Department of Environmental Management (“the Department”), provides that the regulated or hazardous substances shall remain on or beneath the surface of the property and provides the Environmental Notice that shall ensure the protection of public health, safety, or welfare, and the environment. The corrective action plan, a survey of the areas of said property affected, and a list of the chemicals of concern left on the property may be examined at the offices of the Department.)

(NOTE: The words “corrective action plan” can be deleted and replaced with the correct title of any plan that contains a Risk Integrated System of Closure (RISC) approach (for example, “closure plan”).

NOW THEREFORE, _____ (hereinafter referred to as “Owner”), hereby, in consideration for the promises herein contained and other good and valuable consideration, imposes restrictions on the Real Estate and covenants and agrees that:

1. The Owner shall prevent a conveyance of title, an easement, or any other interest in the real estate from being consummated without adequate and complete provision for compliance with the corrective action plan and prevention of exposure to regulated or hazardous substances as described in item 3 below.
2. The Owner shall grant to the Department and its designated representatives the right to enter the real estate at reasonable times for the purpose of determining and monitoring

- compliance with the corrective action plan, including, but not limited to, the right to take samples, inspect the operation of the corrective action measures, and inspect records.
3. Specific restrictions that may apply shall be listed here (for example, no off-site placement of excavated subsurface soil, no wells installed, maintenance of asphalt cover, description of financial assurance mechanism, etc.)
 4. The restrictions and other requirements described in this Environmental Notice shall run with the land and be binding on the owners successors, assignees, and lessees or their authorized agents, employees, or persons acting under their direction or control.
 5. The restrictions shall apply until the Department determines that regulated or hazardous substances no longer present an unacceptable risk to the public health, safety, or welfare, or to the environment. This Environmental Notice shall not be amended, modified, or terminated except by written instrument executed between the Owner and the Department at the time of the proposed amendment, modification, or termination. Within five (5) days of executing an amendment, modification, or termination of the Environmental Notice, the Owner shall record such amendment, modification, or termination with _____ County Registrar of Deeds and within five (5) days thereafter, the Owner shall provide a true copy of the recorded amendment, modification, or termination to the Department.
 6. If any provision of the Environmental Notice is also the subject of any laws or regulations established by any federal, state, or local government, the stricter of the two standards shall prevail.
 7. In the event that the Risk Integrated System of Closure (RISC) is adopted by rule in Indiana, this Environmental Notice shall be modified, if necessary, to conform with the Indiana RISC regulations for the scope or specificity of the Environmental Notice. In no event shall this Environmental Notice be rendered null and void if Indiana's RISC guidelines for an Environmental Notice differ in form or content.
 8. The undersigned persons executing the Environmental Notice on behalf of the Owner represent and certify that they are duly authorized and have been fully empowered to execute and deliver this Environmental Notice.

I hereby attest to the accuracy of the statements in this document and all attachments.

IN WITNESS WHEREOF, the said Owner of the real estate described above has caused the Environmental Notice to be executed on this _____ day of _____, 20____.

Owner

(If Owner is an individual:)

STATE OF INDIANA

COUNTY OF *(county where document is executed)* }SS:

BEFORE ME, the undersigned, a Notary Public in and for said County and State, personally appeared _____ and _____, the _____ and _____, respectively, of _____, the Corporation that executed the foregoing instrument, who acknowledged and affirmed that they did sign said instrument as such officers, respectively, for and on behalf of said Corporation and by authority granted in its Articles of Incorporation and by its governing body, that the same is their free act and deed as said officers, and the free and corporate act and deed of said Corporation.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this _____ day of _____, 20____.

My county of residence is:

_____ County, Indiana

Signature of Notary Public

My commission expires:

Printed Name of Notary

(If Owner is a partnership:)

STATE OF INDIANA

COUNTY OF *(county where document is executed)* SS:

BEFORE ME, the undersigned, a Notary Public in and for said County and State, personally appeared *(name of person executing document on behalf of partnership)*, who acknowledged and affirmed that he/she is a general partner of *(name of partnership)*. The partnership named in this document, that he/she did sign said instrument in his/her capacity as a general partner of *(name of partnership)*, and that the same is the free act and deed as said persons and of said partnership.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this _____ day of _____, 20____.

My county of residence is:

_____ County, Indiana

Signature of Notary Public

My commission expires:

Printed Name of Notary

The owner of the property should use whatever notary jurat is applicable to the situation.

(If Owner is a corporation:)

STATE OF INDIANA

COUNTY OF *(county where document is executed)* SS:

BEFORE ME, the undersigned, a Notary Public in and for said County and State, personally appeared *(Owner's name)*, who acknowledged and affirmed the execution of the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this _____ day of _____, 20____.

My county of residence is:

_____ County, Indiana

Signature of Notary Public

My commission expires:

Printed Name of Notary